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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. .....

LAMBROS G. METRAKOS,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD CO. (Dismissed Below), THE CLEVELAND UNION TERMINALS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the said Court, *Lambros G. Metrakos v. New York Central Railroad Co.* (Dismissed Below), *The Cleveland Union Terminals Company,* on June 17, 1954.

OPINIONS BELOW.

No opinions below.

JURISDICTION.

The judgment of the Court of Appeals was entered April 8, 1954, petition for rehearing filed April 21, 1954, and denied on June 17, 1954. The jurisdiction is invoked under 28 U. S. C. A. § 1254(1): that there is a question of Federal law, to-wit: the construction and application of the Federal Employers' Liability Act, as to what charge must be given on burden of proof in cases under such

Act in the District Courts of the United States, which question has not been, but should be, settled by this Court.

QUESTION PRESENTED.

I. Is it error for a trial Judge in an action in the United States District Court for the Northern District of Ohio, Eastern Division, under the Federal Employers' Liability Act to charge the jury that the petitioner must prove his cause of action to the satisfaction of the jury?

STATUTE INVOLVED.

Title 45, Sec. 51, Federal Code Annotated:

RAILROADS.

"Chapter 2. Liability for Injuries to Employees. Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, * * * works * * * or other equipment."

STATEMENT.

The petitioner, a car cleaner, sued his employer, The Cleveland Union Terminals Company, under the Federal Employers' Liability Act for serious injuries suffered in the course of his duty in a railroad car.

While removing a water tank, his foot slipped on the soapy, littered floor, with the result that he suffered a rupture of discs of the vertebrae, causing him permanent injuries and impairing his ability to earn.

The jury brought in a verdict for the defendant which was caused by the overburdensome charge to the jury. The Court of Appeals affirmed. An adequate statement of the facts is below contained.

In the record are the Complaint and the Answer on which issue was made. The case was tried to a jury which returned a verdict for the defendant. Motion for new trial was filed, overruled and the appeal to Court of Appeals was perfected.

THE FACTS.

The plaintiff, then 24 years of age, was in the employ of The Cleveland Union Terminals Company on February 19, 1949. At that time he was assigned to a job known as Temporary Car Cleaner and had been in that category for a short time prior to the date of his injury. His general duties concerned themselves with icing and watering water coolers in coaches.

At about 6: 00 P. M., on the day of injury, his foreman peremptorily ordered him to do a special job on a New York Central mail car. He was given the car number and told that a mail car water tank was contaminated; that he should remove it, steam it and change it.

Plaintiff then went to this particular car to the point where the water cooler tank was located at the end of the car adjoining a wall which separated the water tank from a moveable wash basin, as shown by exhibits. This water tank was between 31 inches and 36 inches high and it rested on a metal stand with a flange, the bottom of said stand being 3 feet from the floor. This water tank did not have any handles on it whatsoever and it was made of galvanized sheet metal.

The way it was set into the stand made it very difficult to remove because it rested in an inset of the stand.

The plaintiff had never before removed a tank of this kind and had never been informed of its weight. Owing to the condition of the spigot of the tank the water could not be drained and the plaintiff was compelled to try to remove the tank in its condition. As he started to lift it out of the stand and against his shoulder, his foot slipped and he went to a crouched position with the tank and so incurred the injury described below. He fell to his right knee with the tank resting on one corner of the floor, he holding on to the tank with his arms and body (C. R. 8a).

The plaintiff, after the occurrence, observed the presence of soapy water on the floor and the presence of orange peels and debris (C. R. 8a).

Though he had a pain in his lower right back as a result, he did some more work, but owing to sharp pains and inability to straighten up, obtained assistance and then went to the office to tell the foreman that he could not bend down and was in pain (C. R. 9a).

He then went home, received some assistance from his wife, and on arising discovered he could not move either leg without pain and could not get out of bed without his wife's help (C. R. 9a). He then went, the next day, with his wife to Lutheran Hospital and after getting back from the hospital and on the same day, called his family physician, who gave him some injections and prescribed a homemade belt and advised him not to walk or overexert himself (C. R. 10a). The day was the 20th of February, 1949.

He was unable to do any work for over two months, and then was examined by the railroad doctor (C. R. 10a).

The diagnosis of Dr. Wolkin, a specialist, as well as myelogram x-rays (C. R. 13a, 16a), showed a rupture of the disk between the 4th and 5th lumbar vertebrae and also of the disk between the 5th lumbar and sacrum.

It was testified by the doctors that the final result of a herniated disk, as the condition is called, is a restricted back movement and severe attacks of pain with no assurance of recovery or ability to work as before.

Before the injury the plaintiff earned $4,800.00 a year with an hourly rate of $1.03 and the rate in 1952 was $1.57 an hour, and he had an expectancy of 40.21 years.

The answer of respondent admitted that petitioner may have sustained injury to his spine in lifting while at work but denied negligence (C. R. 7a). There was an issue as to negligence—the jury found for defendant. We claim the court's charge was too burdensome.

This Statement is given so the prejudicial effect of the errors charged by the petitioner will appear.

REASONS FOR GRANTING THE WRIT.

1. Construction of Federal Employers Liability Act.

The statute under which the action was brought was Title 45, Sec. 51, Federal Code Annotated, creating a liability of laws for injuries to employees, which reads as follows:

RAILROADS.

"Chapter 2. Liability for Injuries to Employees. Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, * * * works * * * or other equipment."

This statute does not describe the burden of proof of the injured employee. As far as we are able to determine, the terms of the instruction as to burden of proof have never been laid down by any Federal Court. In the case at bar the trial Judge charged the jury that the plaintiff must prove the negligence of the defendant to the satisfaction of the jury by a preponderance of the evidence. Quoting from the charge of the Court, C. R. 22a:

> "The Court. Now, before you arrive at a verdict in this case you will proceed to examine whether or not the plaintiff has established to your satisfaction by a preponderance or the over-weight of the evidence that the defendant was negligent in the respects claimed or contended for by the plaintiff or in any one of the respects claimed or contended for by the plaintiff."

The United States Court of Appeals, affirming the District Court, was of the opinion that the charge was proper.

We deny the charge was proper because an instruction that the jury had to be satisfied that defendant was negligent was placing a greater burden on the plaintiff than is normally required in a civil case.

An examination of several definitions of the word "satisfy" or "satisfaction" shows why this is so.

Ballentine's Law Dictionary with Pronunciations defines "satisfaction of the jury" as follows:

> "To prove a thing to the satisfaction of a jury means that the jury must be satisfied that the thing existed. To satisfy the mind, according to the common notion of mankind, is to free it from doubt, to set it at rest. This is the primary meaning of the word, according to all the lexicographers, when used in this connection. To accomplish this result—to 'satisfy' a body of men of the truth of a disputed fact—requires much more than a preponderance of the evidence. Clear and con-

vincing evidence must be adduced in its favor." See *Kelch v. State,* 55 O. S. 146.

Webster's New Twentieth Century Dictionary of the English Language Unabridged has this definition of the word "satisfy":

"To free from doubt, suspense or uncertainty; to give full assurance to; to set at rest the mind of; to convince; as to satisfy oneself by inquiry."

The charge given in the case at bar is also contrary to the spirit of the Federal Employers' Liability Act as it has been interpreted by this Court. The Court has attempted to give to this Act an interpretation consistent with the maximum opportunity for recovery by the injured workman. For example, there is the case of *Wilkerson v. McCarthy,* 336 U. S. 53. In that case the employee sued for injuries suffered as a result of stepping on a board which was slippery and greasy so that he fell into a pit. Justice Black there said (page 55):

"This court has previously held in many cases that where jury trials are required, courts must submit the issue of negligence to a jury if *evidence might justify* a finding either way on those issues. * * * It was because of the importance of preserving for litigants in F. E. L. A. cases their right to a jury trial that we granted certiorari in this case."

See also *Lavender, Admr. v. Kurn, et al.,* 327 U. S. 645, where a switch tender was killed in the switchyard, it was claimed, when he was caught by a mail hook end swinging out. There were no eye witnesses. The Court said, on page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of specula-

> tion and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference * * * jury is free to discard or disbelieve whatever facts are inconsistent. * * *"

The reference to speculation and conjecture clearly indicates that the Supreme Court recognizes a jury must deal with probabilities, and certainly, if a jury is dealing with probabilities and must unite to arrive at a verdict, then a charge requiring that the jury be satisfied by a preponderance of the evidence defeats the liberal and remedial purpose of the Act, and places a greater handicap on the petitioner than was intended by Congress.

The trial Court in the case at bar, by charging as he did, deprived the petitioner of his full rights under the Federal Employers' Liability Act.

There have, as yet, been no decisions by the Supreme Court of the United States defining this point. Also there has been no prior opinion handed down by any Circuit Court of Appeals on this question.

We, therefore, urge this Court to allow this petition for writ of certiorari so that a standard be set up for all future F. E. L. A. cases tried in Federal Courts.

While there have been no federal opinions on this question, there are numerous state Court decisions which have reversed judgments where the trial Court charged that the jury had to be satisfied by a preponderance of the evidence.

We respectfully direct the Court's attention to the following cases, making particular reference to the decisions of the Ohio Supreme Court.

The Supreme Court of the State of Ohio declared in *The Cincinnati, Hamilton & Dayton Railway Company v. Frye,* 80 O. St. 289, Syl. 2, which was an action by an em-

ployee of a railroad for injuries resulting from the derailment of a locomotive, that he was entitled to an instruction merely requiring the jury to find the issue from the probabilities; that it was error to charge that the jury must be satisfied by a preponderance of the evidence.

We list below other Ohio cases and decisions from high Courts in other States which express themselves on the unfairness of any other rule than that of probabilities where a railroad employee is suing under the Federal Employers' Liability Act.

The Federal Employers' Liability Act is a remedy made available to injured workmen in all of the 48 States. It is important, therefore, that a standard of burden of proof be determined by the Federal Courts to apply to all litigation arising out of the Act wherever such litigation be tried in the Federal Courts. Until now no such uniform rule has been laid down by the highest Court of the land.

OTHER RELEVANT DECISIONS.

The court in the above cited case of *Cincinnati, Hamilton & Dayton Railway Company vs. Frye,* 80 O. S. 289, states in its opinion:

> "* * * In Davis v. Guarnieri, 45 Ohio St. 471, this court, in the eighth paragraph of the syllabus, declares the law to be that: 'In the trial of a civil action where the preponderance of the proof is to determine the issues, the court or jury deals simply with the probabilities in the case.' And in the opinion, at page 490, Owen, C. J., says: 'It is not necessary to the determination of the issues, in a civil case (with very few exceptions, of which the present is not one), that the triers should believe the existence of any material fact, but that the probabilities, when weighed by them, preponderate in favor of the fact which they find to be established by the proof. * * *' "

The principle of that case is followed to this day, but we give only one of the number of the later cases.

See *Kuhn v. Banker,* 133 O. St. 304, where the Court says:

"The jury deals with probabilities and it is for the jury in weighing the evidence where the probability lies."

An error as to burden of proof requires a reversal because of the plain injustice of a charge which places a greater burden than the plaintiff was required to sustain under the law, and the Courts have set aside verdicts obtained under an improper charge as to burden of proof.

Heacock v. Baule, Supreme Court, Iowa, 245 N. W. 753, 754 (1932).

Headnote 4:

"Instruction to finding preponderance of evidence as testimony which best satisfies jury's minds it is true *held* erroneous because of word 'satisfies,' plaintiff being merely required to prove case by preponderance of evidence."

Page 754:

"In civil cases a fact may be found in accordance with the preponderance of the evidence, and yet the mind may be left in doubt as to the very truth. The triers of an issue in such cases should, when doubts arise, find for the side whereon the doubts have less weight. (Quoting Bryan v. Chicago, R. I. & P. Ry. Co., 63 Iowa, 464, 19 N. W. 295.)"

"* * * The jurors' minds might not be 'satisfied' with the truth of the evidence on either side of a case, yet the law requires that they shall weigh both sides and the side on which the weight of the evidence preponderates is entitled to the finding. * * * this is the rule in civil cases. * * *"

A later opinion corrects an error in an entry and to the benefit of the plaintiff.

Perrett v. Southern Pacific Co., 73 Cal. App. (2) 30, 165 P. 2nd 751, 756.

> "There is another instruction that was clearly erroneous. At the request of the defendant the jury was instructed that the defendant could be held liable only 'upon proof which satisfies your mind that the plaintiff's injuries were proximately caused by some negligence upon its part.' Of course, in a civil case the degree of proof is preponderance of the evidence and not proof to the satisfaction of the jury."

SPECIFICATIONS OF ERRORS TO BE URGED.

1. In holding that the charge of the trial Judge as to burden of proof was proper, though it required proof by the petitioner to the satisfaction of the jury;

2. In affirming the judgment of the District Court.

CONCLUSION.

It is plain that though the trial Court submitted to a jury the issue of negligence causing injury to an employee of the railroad from slipping and other causes in a railroad car, it nevertheless interfered with the jury's function by not allowing the jury, under the charge, to determine the issue of negligence from mere probabilities. A charge that the jury must be satisfied can only mean beyond a doubt, and if the jury is required to overcome a doubt before it can give relief to an injured railroad man, then, we submit, that few will have the opportunity to recover under the policy and purpose of Congress as announced in the Federal Employers' Liability Act.

Before his injury Lambros G. Metrakos earned $4,800.00 a year, and it may be asked how did it come about that this hardworking man received no award from his injuries?

Although the issue on injury was contested, it was only as to degree, because the respondent in its answer admitted the petitioner suffered back injury while lifting. However the issue on negligence was sharply contested.

A contest always raises doubt and uncertainty. The trial judge then instructed the jury in language as defined by Webster to mean freedom from doubt or uncertainty. Thus the jury was not allowed to weigh probabilities or decide the issue of negligence on preponderance—they being human and subject to doubts raised by the contest could not find for the petitioner under an instruction which said in essence—unless you are free from doubt or uncertainty as to the issue of respondent's negligence—you must find for the respondent.

This analysis of the effect of an instruction which requires the jury to be free from doubt clearly points up the prejudicial effect and danger to the rights of all injured railroad workers who in the future may have occasion to ask for relief under the Act in the Federal Courts.

We urge this Honorable Court to allow this writ of certiorari so that a fair standard on burden of proof be established for all cases brought under the Act in the federal district courts.

Respectfully submitted,

WILLIAM J. CORRIGAN,

Attorney for Petitioner.

THEODORE T. SINDELL,

Of Counsel.

APPENDIX.

Judgment of the United States Court of Appeals for the Sixth Circuit, and Order Denying Rehearing.

JUDGMENT.

(Filed April 8, 1954.)

Upon consideration of the briefs and record in the above cause and the oral argument of the counsel therein, and perceiving no prejudicial error at the trial below, either preserved by timely objections at the trial or otherwise appearing, and the cause having been fairly submitted to the jury with a verdict for the defendant of no cause of action being by it returned,

IT IS HEREBY ORDERED that the judgment below be and it is hereby

Affirmed.

ORDER DENYING REHEARING.

(Filed June 17, 1954.)

Upon consideration of a petition for rehearing in the above entitled cause, it is hereby ordered that the petition be and it is hereby

Denied.

FILED
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HAROLD B. WILLEY, Cle

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 336.

LAMBROS G. METRAKOS,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD CO. (Dismissed below),
THE CLEVELAND UNION TERMINALS COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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In the Supreme Court of the United States

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No. 336.

LAMBROS G. METRAKOS,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent prays that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in said Court, *Lambros G. Metrakos v. New York Central Railroad Co.* (dismissed below), *The Cleveland Union Terminals Company*, on June 17, 1954, be denied.

COUNTER-STATEMENT OF THE QUESTION PRESENTED.

In the absence of any objection by plaintiff's counsel to the claimed error until the case was appealed to the United States Court of Appeals for the Sixth Circuit, did the United States District Court trying this case under the provisions of the Federal Employers' Liability Act commit prejudicial error when he charged the jury four distinct times that the plaintiff must establish the negligence of the defendant by a preponderance of the evidence and once that the plaintiff must establish "to your satis-

faction by a preponderance or the overweight of the evidence that the defendant was negligent"?

COUNTER-STATEMENT TO PETITIONER'S STATEMENT AND FACTS.

Petitioner states at page 2 of his Petition that plaintiff's "foot slipped on the soapy, littered floor, with the result that he suffered a rupture of discs of the vertebrae." Whether the plaintiff in fact slipped and whether the floor contained any foreign matter were questions sharply contested in the trial. This conflict in the evidence is illustrated in the testimony of five witnesses (C. R. 7a to 17a, inclu.)* and in the cross-examination of one of the plaintiff's doctors (C. R. 1a, 2a). This testimony is clearly contradictory to any claim of slipping. Furthermore, the testimony (C. R. 10a, 11a), of the car cleaner, Nick Bellino, working with the plaintiff, contradicts plaintiff's assertion that the floor was slippery. In fact, Bellino testified that the floor was dry.

Petitioner's statement of facts, at page 4 of his Petition, states that the water could not be drained from the tank because of the condition of the spigot of the tank. Frank L. Frerichs, General Foreman of the defendant, testified that in his twelve years experience as Superintendent, he had never known of a tank being plugged up but that there are lids on the top of the tanks which the workmen could remove and tip the tank to drain it into a bucket. (C. R. 18a to 20a.)

This testimony is referred to in this counter-statement because it afforded part of the ample evidence on which

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* All references to the Certified Record in this brief are to the Appendix of the brief of the Defendant-Appellee in the Court of Appeals.

the jury could and did find the defendant free from negligence.

REASONS FOR DENYING THE WRIT.

1. The Charge of the Trial Court Was Not in Error.

In its charge to the jury the Court stated five different times that the plaintiff must establish his case by a preponderance of the evidence and in some detail defined preponderance of the evidence. The pertinent parts of the charge are here quoted from the transcript for the convenience of the Court.

> "The Court: * * * (326) In order for the plaintiff, Lambros Metrakos, in this case to recover (327) for his damages from the defendant, the Cleveland Union Terminals in the present case, it is necessary under the terms of this statute that he establish by a preponderance of the evidence that the defendant, and its agents or employees, or its agents and employees, were negligent, and that such negligence was the proximate cause of the accident and injuries sustained by the plaintiff.
>
> "In the course of my addressing you I shall refer at greater length both to the matter of preponderance of evidence and the term 'negligence' and the meaning of both of those terms.
>
> * * * * *
>
> "(330) The burden of proof in this case, as in all cases of a civil nature, is on the plaintiff to prove by a preponderance of evidence all the essential and the material claims made by the plaintiff in his bill of complaint or in the complaint addressed to the Court, and which the defendant denies in its answer, in order that he may be entitled to a verdict in his favor at your hands.
>
> "By a burden of proof, members of the Jury, is meant the duty of producing sufficient evidence to

lead you to believe that the facts are as the one who has the burden claims them to be.

"By a preponderance of the evidence I mean an overweight of the proof. This does not necessarily mean that one side is required to have more witnesses than the other. It is well to place the evidence, as it were, on a pair of scales in your minds, and by so doing determine in whose favor the evidence (331) preponderates. And if the evidence in support of the plaintiff upon the issues as I have stated them to you weighs more heavily in the plaintiff's favor then the preponderance is in his favor. If the evidence is equally balanced, then it may not be said that it preponderates in plaintiff's favor. I repeat, if the evidence is equally balanced then it may not be said that it preponderates in plaintiff's favor.

* * * * *

"(348) Now before you arrive at a verdict in this case you will proceed to examine whether or not the plaintiff has established to your satisfaction by a preponderance or the overweight of the evidence that the defendant was negligent in the respects claimed or contended for by the plaintiff or in any one of the respects claimed or contended for by the plaintiff.

"Negligence, as the term is used in the instructions to you, Ladies and Gentlemen, means the failure to use ordinary care. Ordinary care, of course, depends on the circumstances of each particular case. Ordinary care is described usually, almost in a stereotype form, as such care as a person of ordinary prudence would use or exercise under the same or similar circumstances having regard for the things to be accomplished and the rights of any persons who have relation to those things.

"(349) If by a preponderance of the evidence you find the defendant was negligent in any one or more of these particulars claimed by the plaintiff you are required to determine, of course, whether or not that

negligence was the direct and proximate cause of the injury, loss and damage concerning which the plaintiff complains. The word 'proximate' I use in contrast to the word 'remote.' A proximate cause is the real cause. What was the real cause of this accident? Was the defendant guilty of negligence which proximately caused it? If you do find by the preponderance of the evidence that the defendant was guilty of negligence in one or more of the particulars claimed by the plaintiff, and if such negligence was the direct and proximate cause of the injury and loss and the damage sustained by the plaintiff or suffered by the plaintiff, then your verdict will be for the plaintiff and against the defendant." (C. R. 20a, 21a, 22a.)

After the jury had retired to consider the case, it returned for further instructions and in the proceedings at that time Court again referred to the preponderance of the evidence, as follows:

"(355) The Court: Do I understand you have an inquiry to make of some sort?

"The Foreman: Your Honor, the Jury would like to make this inquiry: they are of the opinion—

"The Court: Don't express an opinion. You may make an inquiry as to any proposition you want to know, but don't tell us what the opinion is.

"The Foreman: We request to know that if we find no point of negligence on the part of the defendant whether or not there is any way that some compensation can be gotten to the plaintiff, although the Jury cannot find any point of negligence?

"The Court: Well, I have instructed you that the only basis or the only right of recovery is if you find by a preponderance of the evidence that the defendant was guilty of negligence in some respect. You don't have to find that the defendant was guilty of all the charges of negligence. If you find that the defendant was guilty of any negligence claimed then there is a

right of recovery, but the Jury must find the defendant was guilty of negligence in one or (356) more of the respects claimed by the plaintiff.

"Does that answer your question?

"The Foreman: Thank you, I think it does.

"The Court: Any objection to that, Mr. Sindell?

"Mr. Sindell: No.

"The Court: You may retire." (C. R. 22a.)

The third time that the Court referred to the preponderance of the evidence, it will be noted from the above quotation, he charged that the jury should examine "whether or not the plaintiff has established to your satisfaction by a preponderance or the overweight of the evidence that the defendant was negligent in the respects claimed or contended for by the plaintiff or in any one of the respects claimed or contended for the plaintiff." This is the part of the charge on which petitioner bases his claim of error.

The Court had previously defined the preponderance of the evidence by the metaphor of a pair of scales balancing the evidence on both sides to determine in whose favor it preponderates. It must be clear to anyone that the word "satisfaction" as used in context by the Court and qualified by the quantum of proof could mean to the jury only that it must find the scales weighted in favor of plaintiff's contentions. The Court did not charge the jury that it need to be satisfied with the evidence but only that it be satisfied that the evidence preponderated in the plaintiff's favor. When the jury returned for further instructions the charge did not again use the word "satisfaction."

Even were we to assume, that standing alone the language complained of would be error, which respondent does not admit, the question cannot rest there for the fact

is the Court at other times during its charge certainly gave a correct statement of law.

> "We think the question is whether, on the whole, the charge gave the jury the necessary legal instruction and whether it presented to them fairly questions which they had to decide. If it did, we think there is no reversible error even though some portions of the charge might have been improved by polishing and other portions wholly deleted." *Robak vs. Pa. R. Co.*, 178 Fed. 2nd 485, 486.
>
> "It is elementary that instructions must be considered as a whole. Even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or a consideration of the entire charge. * * *
>
> "Once the Judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *Southern Pacific Co. vs. Souza*, 179 Fed. 2nd 691, 694, 695. See also *Moore's Federal Practice*, 2 Ed., Volume 5, page 2503, and *Cyclopedia of Federal Procedure*, Third Edition, Volume 9, pages 382 and 422.

The fact that plaintiff's counsel, listening to the charge with the practiced ear of an experienced trial counsel, raised no objection prior to the jury's retirement or even upon the subsequent return for further instructions, is indicative of the whole effect created upon the jury by the charge. In *Kieffer v. Blue Seal Chemical Co.*, 196 Fed. 2nd 614, the United States Court of Appeals for the Third Circuit said at page 616:

> "If the judge's charge seems to counsel ambiguous as he hears it, he can seek to have it further amplified, revised or amended so that the jury will get a clear picture. But if it is not so confused that the ex-

perienced trial lawyer senses no confusion as it is given, we do not think that because it does not appear sun clear in type thereafter there is a basis for complaint. At the worst this charge was ambiguous, not erroneous. We think that a complaint about it, if there was a complaint, should have been made at the time and the trial judge given an opportunity to clarify his language."

This failure of counsel to object will be further considered in the second branch of this argument but is thought worthy of comment at this point to emphasize the general atmosphere created by the Court's charge.

The petitioner's brief relies largely on the case of *Cincinnati, Hamilton & Dayton Railway Co. v. Frye*, 80 Ohio St. 289. That case is distinguishable from the instant case in that the language described by the Court was the only definition of the burden of proof which the trial Court gave to the jury and that was given several times. The reference to the *Frye* case is misleading for it does not clearly state the Ohio law. In the much later case of *Traveler's Ins. Co. v. Gath*, 118 Ohio St. 257, the Supreme Court of Ohio made the distinction between "satisfy" and "reasonably satisfied by the weight or preponderance of the evidence" and held the latter unobjectionable.

The Ohio law is not pertinent in the instant case in any event. The instant action being under the provisions of the Federal Employers' Liability Act, the Federal law governs the question and not the State law. The doctrine of *Erie Railroad v. Tompkins*, 304 U. S. 64, has no application to a Federal Employers' Liability Act case since such a case arises under an act of Congress, and Mr. Justice Brandeis so stated the rule in that opinion.

2. The Petitioner Having Failed to Call the Claimed Error to the Court's Attention Cannot Raise the Question on Appeal.

At no time during the charge or at its conclusion or even when the jury returned for further instructions, did petitioner's counsel offer the slightest objection to the language in the Court's charge. In fact not even in the eighteen legal size page motion for new trial filed by petitioner's counsel was the so-called error of the charge mentioned.

It is submitted that it is completely settled that objections to the introduction of evidence or to portions of the charge must be made at the time of the offer or of the question or as to the charge at least before the jury retires and must state specific grounds. See for example the very early case of *Patrick vs. Graham*, 132 U. S. 627.

Rule 46 of the Rules of Civil Procedure does away with the necessity of formal exceptions but still requires that counsel make known to the Court his objection to the action of the Court and his grounds therefor. Rule 51 provides that no party may assign as error the giving or failing to give an instruction unless he objects thereto before the jury retires, stating the matter to which he objects and the ground of his objection. Rule 46 should be read in conjunction with Rule 51 and both are matters of substance and not a mere technicality. *Johnston vs. Reily*, 160 Fed. 2nd 249. *Thomson vs. Boles*, 123 Fed. 2nd 487. (Cert. denied, 315 U. S. 804.)

This Court has said in *Palmer v. Hoffman*, 318 U. S. 109, 119:

"In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to

bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

See also *Kieffer v. Blue Seal Chemical Co.*, 196 Fed. 2nd 614, *supra*, page 7, *Massachusetts Bonding & Insurance Co. v. Ray Dilschneider, Inc.*, 203 Fed. 2nd 556, *Transamerican Freight Lines, Inc. v. Universal Die Casting Company*, 192 Fed. 2nd 931, *Trowbridge v. Abrasive Co. of Philadelphia*, 190 Fed. 2nd 825 and *Cafasso v. Pennsylvania R. Co.*, 169 Fed. 2nd 451.

CONCLUSION.

The petitioner's statement of facts standing alone would lead to the conclusion there was an obvious miscarriage of justice in this case. The evidence produced at the trial, part of which has been referred to in this brief, tended to refute plaintiff's claims of negligence leaving a question of fact to be decided by the jury. The case was submitted to the jury under instructions which were not objected to at the time of the trial and the jury returned a verdict in favor of the defendant.

Petitioner contends that this result followed from an overburdensome charge. If this is the fact, which respondent denies, would not plaintiff's counsel have been expected to call to the attention of the trial Court an error so obvious as petitioner now contends it was.

Respondent submits that the charge as given in its context was correct but in any event, petitioner cannot raise the question on review having failed to make timely

objection in order that the Court could consider the matter, before the jury retired.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

C. RICHARD ANDREWS,

Of Counsel.

OCT 13 1954
HAROLD B. WILLEY, Cle

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 336.

LAMBROS G. METRAKOS,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD CO. (Dismissed below),
THE CLEVELAND UNION TERMINALS COMPANY,
Respondent.

BRIEF OF PETITIONER IN REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

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Respondent.

BRIEF OF PETITIONER IN REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in said Court in the case of *Lambros G. Metrakos v. New York Central Railroad Co.* (dismissed below), *The Cleveland Union Terminals Company,* on June 17, 1954, be granted.

REPLY TO COUNTER-STATEMENT OF THE QUESTION PRESENTED.

It is extremely interesting to note that the Respondent in his answer brief carefully avoids the main question raised in our Petition for Writ of Certiorari:

> "I. Is it error for a trial Judge in an action in the United States District Court for the Northern District of Ohio, Eastern Division, under the Federal Employers' Liability Act to charge the jury that the peti-

tioner must prove his cause of action to the satisfaction of the jury?"

This is no time to be splitting hairs on mere technicalities. It is important that this Court create a standard for all 48 states on this most vital question which involves millions of our citizens who work under an important Federal Act. The mere fact that no objection was made is of small consequence at this time, when the real question involves the interpretation of a federal statute.

We agree that the general rules reinforced by decisions require the making of timely objections. However, this Court and lower courts have on many occasions disregarded these narrow rules and decisions in the interest of real justice.

This case, as it now develops, is not so much a matter of justice to the petitioner alone—it affects justice to all railroad workers in the future.

REPLY TO COUNTER-STATEMENT TO PETITIONER'S STATEMENT AND FACTS.

While not conceding the facts to be as presented in Respondent's counter-statement, petitioner will not unnecessarily burden the Court at this point with argument on the facts. The issues here are the interpretation of a federal statute, the right to review and the legal propriety of a charge, not the facts of how the injuries involved took place. Arguments on facts seem improper to petitioner at this stage.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT.

1. The Charge of the Trial Court Was In Error, and Substantially Prejudiced the Accomplishment of Justice and the Rights of the Petitioner.

In determining what is error, it is first necessary to determine what is correct. We have found no decision by the Supreme Court of the United States or by any Circuit Court of Appeals on the proper burden of proof to be applied in an F. E. L. A. case. We, therefore, urge, as we have done earlier, that the Court allow this Petition for Writ of Certiorari for the purpose of setting at rest an important federal question, and in addition for the purposes to be stated which are personal to this petitioner.

Respondent has made an effort to carry water on both shoulders. On the one hand, it attempts to convince the Court that no part of the District Judge's charge on the question of burden of proof is erroneous, and cases are cited in support of that position. An examination of these cases, as will later be shown, indicates they are not in point with the case at bar.

On the other hand, respondent concedes by inference that the trial judge once erroneously defined the burden, but this vice is defended by pointing out that the Court redeemed itself by making correct statements on the same point in other portions of the charge. With this we do not agree and the law supports our position.

Respondent has cited *Cyclopedia of Federal Procedure*, Third Edition, Volume 9, pages 382 and 422. The first citation is contained in a section which discusses proper charges which might have been made more proper. This is not our case. Ours is not a case where a lawful

charge is not polished enough. This is a case where a charge has been made which is contrary to law.

Respondent's second citation from the same text, along with the case of *Robak v. Pa. R. Co.*, 178 F. 2d 485, is employed to demonstrate that a charge is to be construed as a whole.

We agree that a charge is to be treated as a whole, and having said that, we assert that the error involved here rendered the charge as a whole seriously defective. This was an error relating to a fundamental legal issue, burden of proof. This was an error on a delicate issue often not easy to comprehend when the rule is stated correctly. This was an error not cured, but rather rendered more confusing to the jurors by the issuance of conflicting instructions. Petitioner would like to emphasize the last statement, for respondent, from pages 3 through 7 of his brief opposing certiorari attempts to state that because the burden of proof was stated correctly, the point at which it was stated incorrectly is cured. It should be pointed out that when the burden of proof was stated correctly no statement was made by the court to the effect that the jury is to ignore the incorrect statement of the burden of proof.

According to the respondent's novel theory, if a trial judge defines burden of proof four times correctly and one time incorrectly, then the errors have been cured. Carrying that theory to its logical conclusion, let us assume the judge makes three correct statements and two wrong ones, has the defect been cured? Without prolonging this argument, if one were to consider whether or not a judge's charge is prejudicial or not prejudicial on the basis of tallying up the score of right versus wrong statements, at what point would one ultimately arrive? All of the above points out how ridiculous one can become in defending a wrong position.

See *Boswell v. District of Columbia,* 21 District of Columbia 527, wherein the court stated that when instructions are inconsistent, the Court cannot tell which one the jury followed, and if there is error in either, there must be a new trial.

See also *Durant Min. Co. v. Perey Consol. Min. Co.* 93 Fed. 166 in which the Court said that an erroneous instruction is presumed to be prejudicial, and is not cured by a correct direction in another part of the charge. This principle has also been established by Ohio Courts. In *Readnour, Appellant v. The Cincinnati Street Ry. Co., Appellee,* 42 O. O. 311, affirmed 42 O. O. 145, the court said that when the court states a correct rule or principle of law and also states an incorrect rule or principle of law with reference to the same subject matter, no presumption arises that the correct rule was applied by the jury in consideration of the issue presented, and the error in giving the incorrect rule will be deemed prejudicial.

On pages 7 and 10 of its brief, respondent relies on the case of *Kieffer v. Blue Seal Chemical Co.,* 196 F. 2d 614. In that case, the question of an erroneous charge was not involved, the court pointed out that all that was involved there was, at worst, a charge which should have been amplified. Ours is not a case where mere amplification will help. There was a clearcut erroneous statement in the case at bar. How can we speculate as to which definition the jury adopted? As long as there is doubt on this subject it must be resolved in favor of the proposition that the jury was misled by the erroneous statement of the rule, otherwise it cannot be said petitioner had a fair trial under law.

No presumption arises that the jury followed the correct charges.

On page eight of its brief respondent characterizes our reference to *Cincinnati, Hamilton & Dayton Rwy. Co. v. Frye,* 80 Ohio St. 289 as being "misleading," and proceeds to demonstrate that the case of *Traveler's Insurance Co. v. Gath,* 118 Ohio St. 257 is controlling.

We wish to point out that the *Cincinnati* case has never been overruled, and stands for the proposition that the trial judge cannot charge a jury that they must be satisfied by a preponderance of the evidence.

The respondent on page 8 of his brief holds out the proposition that the opinion in the *Traveler's* case held language "reasonably satisfied by the weight or preponderance of the evidence" is a proper charge. This was not determined by the *Traveler's* case.

An examination of the case, however, reveals that the court held that language "or is more satisfactory to your minds" etc. is a proper charge. And in fact this same decision stands for the proposition enunciated by the leading cases of the state that the word "satisfied" is improper when used as a standard for burden of proof. Respondent by a play on words is confusing two propositions.

On page 8 of Respondent's brief it is stated that the *Traveler's* case held the use of the words "reasonably satisfied" was proper. Although the decision did not stand for this proposition, we assert that there is a vast difference between using "reasonably satisfied" and "satisfied" when charging a jury on burden of proof, because reasonably satisfied leaves room for a doubt whereas satisfied means there must be no doubt, as defined by Webster. Respondent is unfair when it cites cases to support the proposition that the use of the word satisfy is proper, when it turns out in truth and fact that none of the cases cited by the respondent directly hold that the use of the word satisfy or satisfaction in charging the jury on burden of proof is proper.

2. The Petitioner's Failure to Object to the Charge Does Not Bar the Court From Hearing on Appeal the Question of Whether the Charge Prejudiced Substantial Rights of the Petitioner, and Justice in the Case.

The respondent, on pages nine and ten of his brief opposing Petition for Writ of Certiorari argues with vigor that it is "completely settled" that objections to evidence or to a charge must be made before the jury retires. In support thereof *Patrick vs. Graham*, 132 U. S. 627 (1890), a case in which the charge to the jury is never an issue, is cited.

Nevertheless, it is not the petitioner's intention to dispute respondent's allegations and supporting citations to the effect that there is a clear general rule that timely objection must be made to errors for them to be appealable.

We believe that this general rule has been unnecessarily belabored, for the issue in this case is the equally clear exception to the general rule, not mentioned in respondent's brief, that in spite of the absence of objection below, a Court on appeal may correct errors where substantial rights of litigants are prejudiced or where justice requires the correction of the error.

This principle was enunciated clearly in *Hormel v. Helvering*, 312 U. S. 552, 61 S. Ct. 719 (1941), a case which was more extreme in overlooking failure to act at the trial than is our case. In that case the Court permitted the assertion of a new theory of liability at the appellate stage which was never presented for hearing below. The Court spoke as follows:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and

> under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice * * *. These decisions and orders like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice."

This principle found expression in a more recent case similar to the case at bar, *Willis v. American Barge Line Co., Inc.*, 87 F. Supp. 919 (1949).

In that case, as in the case at bar, there was a claim of a defective charge. However, no objection was taken at the time the error was committed. Because of the great principle enunciated by this Court, a superficial argument of failure to object was overlooked.

We cite the following cases wherein federal courts have approved the overlooking of failure to object: *Rowlik v. Greenfield,* 87 Fed. Supp. 997; *Shimabukuro v. Nagayama,* 140 F. 2d 13 (D. C. Cir. 1944).

CONCLUSION.

Respondent has not been able to overcome the points of law raised by petitioner. Respondent's brief impresses one with the feeling that it too realizes that there was a miscarriage of justice by reason of the erroneous charge. Otherwise, why would respondent rely so heavily on the defense that the petitioner's lawyer failed to make an objection to the court's charge. We feel that this Court will transcend a technical defense in order to determine a question never before presented to this Court.

No mere technicality should prevent this Court from laying down a fair standard on burden of proof to be applied to all F. E. L. A. cases in the federal district courts.

Respectfully submitted,

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